


2005

# Tax Exemption of American Churches and Other Nonprofits: One Election Cycle After Branch Ministries v. Rossotti

Jerome Park Prather  
*University of Kentucky*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Election Law Commons](#), and the [Nonprofit Organizations Law Commons](#)  
**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

## Recommended Citation

Prather, Jerome Park (2005) "Tax Exemption of American Churches and Other Nonprofits: One Election Cycle After Branch Ministries v. Rossotti," *Kentucky Law Journal*: Vol. 94 : Iss. 1 , Article 6.  
Available at: <https://uknowledge.uky.edu/klj/vol94/iss1/6>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

## NOTES

# Tax Exemption of American Churches and Other Nonprofits: One Election Cycle After *Branch Ministries v. Rossotti*

*Jerome Park Prather*<sup>1</sup>

## I. INTRODUCTION

ON a Sunday morning in early October, three weeks before the 2004 presidential election, John Kerry, joined by politically prominent clergymen Jesse Jackson and Al Sharpton, stood at the pulpit of a Florida Baptist church and shared a message partly of faith and partly denouncing President George W. Bush.<sup>2</sup> During the summer of 2004, the Bush campaign raised eyebrows when it called for churches and churchgoing campaign volunteers to take twenty-two specific steps to support Bush.<sup>3</sup> The list of tasks included sending copies of church directories to Bush campaign headquarters, distributing voter guides at the volunteer's church, and identifying and organizing other conservative congregations for President Bush.<sup>4</sup>

During Senator Kerry's visit to the Baptist Church in a contentious electoral battleground state, he quoted scripture from the books of James, Luke, and Jeremiah and talked about his personal faith.<sup>5</sup> Kerry apparently alluded—negatively—to Bush when he quoted from the book of Jeremiah.<sup>6</sup> He then turned to the political record of the Democratic Party under Bill Clinton, discussing issues including poverty, the federal budget deficit, and overtime pay.<sup>7</sup> Kerry did this all while criticizing his opponent but never calling him by name.<sup>8</sup> During the service, the congregation's minister,

1 J.D. expected, University of Kentucky College of Law, 2006; B.A., Vanderbilt University, 2003. I would like to dedicate this note to my grandfather, John G. Prather, Sr., a fine attorney who inspired me to pursue the study of law.

2 Mike Allen, *Kerry Seeks Support In Black Churches*, WASH. POST, Oct. 11, 2004, at A4.

3 David D. Kirkpatrick, *Bush Appeal To Churches Seeking Help Raises Doubts*, N.Y. TIMES, July 2, 2004, at A15.

4 *Id.*

5 Allen, *supra* note 2, at A4.

6 *Id.*

7 *Id.*

8 *Id.*

standing before parishioners who were holding Kerry-Edwards campaign signs, endorsed Kerry for president, reportedly saying: "To bring our country out of despair, despondency and disgust, God has a John Kerry."<sup>9</sup>

This note will explore the current relationship between churches (and other nonprofit organizations) and electoral politics in the United States. Part II will examine the elements which have created the current conflict and look at the legal standard created by the tax code as applied by the United States Court of Appeals for the D.C. Circuit in its 2000 decision in *Branch Ministries v. Rossotti*<sup>10</sup> and subsequent IRS rulings based on the *Branch Ministries II* decision. The section will explore restrictions on political activity in light of the *Branch Ministries II* decision, including the effect of those restrictions on both electioneering<sup>11</sup> and lobbying, and the interplay between the two. It will note the general lack of enforcement of electioneering rules outside the *Branch Ministries II* case.

Part III will turn to the problems inherent in the laws as written, including the application of *Branch Ministries II*. It will identify the primary problem with enforcement, as the difficulty that any attempt to enforce the current law necessarily requires state actors to look into the content of speech and religious exercise.

Part IV will examine alternatives that are available under current law for churches and other religious organizations that desire to engage in political activity without risking loss of their guaranteed tax exemption. It will also suggest potential avenues for reform in order to create a workable and realistic scheme of law and law enforcement that more accurately reflects the current state of religious-political symbiosis.

The note will conclude in Part V that political involvement by churches remains widespread and largely unchecked, but that most options for regulation, at least through manipulation of the tax code, are unworkable if not unconstitutional.

9 *Id.*

10 *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000). Hereinafter, the court of appeals opinion will be referred to as "*Branch Ministries II*."

11 "Electioneering," as used in this note, refers to any form of active involvement in the political election process, generally in order to persuade voters to vote for a specific candidate or ballot question, or not to vote for a specific candidate or ballot question, in any type of public election, party primary, or caucus. Electioneering does not include activity that is primarily focused on influencing the legislative process. That type of activity falls under the definition of "lobbying." See MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 855 (2002).

## II. THE LEGAL FRAMEWORK

### A. *Elements of the Problem*

Despite Thomas Jefferson's assertion that the First Amendment's effect was to "[build] a wall of separation between church and State,"<sup>12</sup> politics and the pulpit seem to be inextricably intertwined in the present American electoral system. To recognize that religion and electoral politics are so closely linked is simply to accept "political and religious norms and a constitutional interpretation that has dominated most of American history."<sup>13</sup>

Political activity by religious organizations implicates at least two distinct components of the First Amendment: freedom of speech and what is commonly referred to as "freedom of religion."<sup>14</sup> That is, if Congress attempts to limit the involvement of religious organizations in political campaigns, it risks infringing both the free exercise rights and free speech rights of parishioners. But that is exactly what Congress has sought to do through the use of the Internal Revenue Code.<sup>15</sup> Specifically, section 501 of the tax code exempts from federal income taxation certain organizations, including any corporation organized exclusively for religious purposes.<sup>16</sup> By virtue of its status as a tax-exempt charitable organization, contributions to any such organization may generally be deducted from the gross income of the contributor when computing federal income tax liability for the year of the contribution.<sup>17</sup> However, section 501(c)(3) limits that exemption (and thus the related deductions) to include only organizations "which [do] not

12 Letter from Thomas Jefferson to the Danbury Baptists, January 1, 1802, <http://www.loc.gov/loc/lcib/9806/danpre.html>. The early Supreme Court found this to be a definitive statement on the intentions of the framers with regard to the First Amendment's effect on the relationship between church and state.

Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Reynolds v. United States, 98 U.S. 145, 164 (1879).

13 Randy Lee, *When A King Speaks of God; When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391, 392 (2000).

14 The First Amendment actually makes no explicit reference to freedom of religion; religious freedoms actually derive from the both the Free Exercise and the Establishment Clauses. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. CONST. amend. I.

15 26 U.S.C. §§ 1–9833 (2000). Hereinafter, all statutory references are to Title 26, unless otherwise noted.

16 26 U.S.C. § 501 (2000).

17 26 U.S.C. §§ 170(a)(1), (c)(2) (2000).

participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”<sup>18</sup>

For decades, there was no real tension between churches and the IRS in this area. Enforcement of tax rules relating to churches was generally lax, and religious institutions overall were hesitant to enter into the political realm.<sup>19</sup> Then a new enforcement regime emerged during the 1990s.<sup>20</sup> This new regime resulted in a stark dichotomy between policy and practice.<sup>21</sup> During the Clinton administration, the IRS prosecuted Branch Ministries, Inc., doing business as the Church at Pierce Creek, in an attempt to revoke its tax-exempt status.<sup>22</sup> The *Branch Ministries I* case and subsequent appellate decision<sup>23</sup> affirmed the IRS’s authority to revoke a church’s tax-exempt status for participation in political activities which would otherwise be protected under the First Amendment.<sup>24</sup> At about the same time, President Clinton was regularly appearing in churches to campaign for Democratic candidates for state and federal office in the 1998 mid-term elections.<sup>25</sup>

Under Clinton’s successor, George W. Bush, a similar but reversed dichotomy seemed to emerge. In 2004, the Bush campaign was unabashed in seeking the overt aid of conservative churches and their members.<sup>26</sup> At the same time, the IRS began an investigation of the NAACP.<sup>27</sup> The investigation into whether or not to revoke the organization’s tax-exempt status for involvement in a political campaign was based on comments posted on the NAACP website that had been made by Chairman Julian Bond at the organization’s annual convention.<sup>28</sup> Although the NAACP is not a religious organization and would not be protected by the Free Exercise Clause of the First Amendment, it claims tax-exempt status under section 501(c)(3)

18 § 501(c)(3). Hereinafter organizations meeting this statutory requirement will be referred to as “501(c)(3) organizations.”

19 See Lee, *supra* note 13, at 392.

20 See *id.* at 391.

21 See *id.* at 391–92.

22 Branch Ministries, Inc. v. Rossotti, 40 F. Supp. 2d 15, 17 (D.D.C. 1999), *aff’d*, 211 F.3d 137 (D.C. Cir. 2000). Hereinafter, the district court opinion will be referred to as “*Branch Ministries I*.”

23 Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000).

24 *Id.* at 145.

25 See Lee, *supra* note 13, at 391–92.

26 See Kirkpatrick, *supra* note 3, at A15.

27 See Lisa Getter, *The Race for the White House; IRS Investigating NAACP for Criticism of President; Head of the Civil Rights Group Says the Agency’s Response to His Speech is Politically Driven*, L.A. TIMES, Oct. 29, 2004, at A23.

28 *Id.* During his keynote address, Bond said, “The NAACP has always been nonpartisan, but that doesn’t mean we’re noncritical. For as long as we’ve existed, whether Democrats or Republicans have occupied the White House, we’ve spoken truth to power.” He continued to condemn several of Bush’s policies during the rest of the speech. *Id.*

of the tax code<sup>29</sup> and is thus subject to the same restrictions on political activities as tax exempt churches.<sup>30</sup> Critics of the Bush administration claim that the White House is attempting to silence opponents through enforcement of the tax code.<sup>31</sup>

The decision in *Branch Ministries II* sent waves through the religious community, as the case marked the first instance in which the “IRS revoked a bona fide church’s tax-exempt status because of its involvement in politics.”<sup>32</sup> If the case was an indication that the IRS was truly beginning to crack down on churches that engage in political activity, many more churches and other organizations might be in danger of a similar outcome. The IRS, by initiating an investigation of the NAACP,<sup>33</sup> has signaled its willingness to pursue nonprofit organizations that engage in impermissible political activities even if they are not churches. There is a greater sense of urgency for all 501(c)(3) organizations to understand the law and the limits of acceptable political discourse. In the face of such enforcement, organizations that fail to take precautionary steps risk potentially serious financial consequences for both their own treasuries and for their unsuspecting donors, all of whom would be affected if an organization’s tax exempt status were to be revoked.<sup>34</sup>

Several concerns emerge in light of this new enforcement regime: whether it is desirable for Congress to use its tax power to control political speech by certain types of organizations, whether the IRS is properly equipped to evaluate the relative religious and political motivations of religious bodies, and whether churches and other organizations will alter their behavior.

29 See I.R.S. Publication 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986, available at <http://www.irs.gov/charities/article/0,,id=96136,00.html>.

30 See 26 U.S.C. § 501(c)(3) (2000).

31 See Lisa Getter, *The Race for the White House; Kerry Calls for Probe of NAACP Tax Audit; The Justice Department is Asked to Investigate Whether Politics Were at Play in the IRS Action*, L.A. TIMES, Oct. 30, 2004, at A23. Bond’s speech was sharply critical of the president, and President Bush has had a largely contentious relationship with the NAACP since his election. See Getter, *supra* note 27, at A23.

32 About.com, Court Decision Religious Tax Exemption: Branch Ministries v. Rossotti, [http://atheism.about.com/library/decisions/tax/bldec\\_BranchMinistries.htm](http://atheism.about.com/library/decisions/tax/bldec_BranchMinistries.htm) (last visited Sept. 2, 2005).

33 See Getter, *supra* note 27, at A23.

34 Once a 501(c)(3) organization loses its tax exemption, contributions to the organization are no longer tax exempt to the donors, making donors potentially liable for back taxes on contributions they thought were tax exempt at the time the contribution was made.

### *B. Legal Standard*

Several sections of the tax code work together to create the tax exemption and deduction scheme relied upon by qualifying nonprofit organizations and their contributors. Section 501 broadly states that certain organizations will be exempt from federal income taxation.<sup>35</sup> These organizations include corporations and other specific entities "operated exclusively for religious, charitable, scientific" or other specified purposes "and which [do] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."<sup>36</sup>

In addition to the income tax exemption for qualifying organizations, section 170 allows contributors to those organizations to take certain limited charitable contributions and gifts as itemized deductions from adjusted gross income.<sup>37</sup> Section 170 includes in its definition of charitable contribution any gift "which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."<sup>38</sup>

Churches have special advantages under the tax code as compared with other tax-exempt organizations. Under section 508, most organizations claiming tax exemption under section 501(c)(3) must give notice to the IRS that the organization seeks recognition as a 501(c)(3) organization before it may claim exemption from federal taxes and before contributors may deduct contributions.<sup>39</sup> However, churches and related organizations,<sup>40</sup> along with certain small public foundations, are not required to file advance notice with the IRS of their intent to be a tax-exempt organization.<sup>41</sup> Therefore, churches are presumed to be tax exempt while almost all other substantial nonprofit organizations that qualify for tax-exemption must first

35 26 U.S.C. § 501(a) (2000).

36 26 U.S.C. § 501(c)(3) (2000).

37 See 26 U.S.C. § 170 (2000). For individuals, deductions are generally allowable up to fifty percent of the individual's adjusted gross income for the tax year. See 26 U.S.C. § 170(b)(1)(A) (2000).

38 26 U.S.C. § 170(c)(2)(D) (2000).

39 26 U.S.C. § 508(a) (2000).

40 The statute also exempts churches' "integrated auxiliaries, and conventions or associations of churches." 26 U.S.C. § 508(c)(1)(A) (2000).

41 See 26 U.S.C. § 508(c) (2000). An organization exempt from filing under the exception is "any organization which is not a private foundation... and the gross receipts of which in each taxable year are normally not more than \$5,000." 26 U.S.C. § 508(c)(1)(B).

affirmatively demonstrate that they are entitled to tax-exempt status and its accompanying benefits.<sup>42</sup>

There are two key restrictions on political activity imposed by the limitation included in section 501(c)(3): prohibitions on electioneering and lobbying.<sup>43</sup> The scope of these limitations, of course, is determined by relevant case law<sup>44</sup> and the language of the statute itself. Together, these limitations shape the acceptable level of political activity in which a church or other section 501(c)(3) organization may engage.

1. *Electioneering.*— The prohibition on electioneering contained in section 501(c)(3) for nonprofit organizations<sup>45</sup> was upheld in *Branch Ministries II*.<sup>46</sup> The *Branch Ministries* case, initiated at the end of George H.W. Bush's term of office<sup>47</sup> and prosecuted during the Clinton administration,<sup>48</sup> was the first use of the tax code against a church engaged in political activity.<sup>49</sup> Branch Ministries, Inc. was a corporation that operated the Church at Pierce Creek, a Christian congregation in Binghamton, New York.<sup>50</sup> Branch Ministries had been granted tax-exempt status by the IRS in 1983 and was operating under that exemption when the case was initiated.<sup>51</sup> The church entered into the public discourse surrounding the 1992 presidential election in a very public and highly partisan way.<sup>52</sup> Just four days before the election, the church ran identical full-page advertisements in both *USA Today* and *The Washington Times*.<sup>53</sup> The advertisements were overtly political. The ads, which were viewed as supporting the president, did not mention George H.W. Bush by name but did specifically mention Bush's major challenger,

42 See 26 U.S.C. § 508(c). Thus, a donor to a church or similar religious organization can claim tax deductions for contributions made, without gathering any affirmative evidence of the group's approval as a 501(c)(3) organization.

43 See McCONNELL ET AL., *supra* note 11, at 855.

44 See *infra* notes 45–118 and accompanying text.

45 See 26 U.S.C. § 501(c)(3) (2000).

46 *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).

47 *Id.* at 140.

48 *Id.*

49 See *supra* note 32 and accompanying text.

50 *Branch Ministries*, 211 F.3d at 140.

51 *Id.*

52 *Id.*

53 *Id.* In 1996, *USA Today* had a daily circulation of nearly 1.6 million copies, making it the nation's second largest newspaper, behind the *Wall Street Journal*. The *Washington Times* was not among the top 100 U.S. daily newspapers in terms of circulation. Jobs Page: Your Link to Newspaper Careers, 100 largest U.S. Newspapers, [http://www.freep.com/jobspage/links/top100\\_96.htm](http://www.freep.com/jobspage/links/top100_96.htm) (last visited June 15, 2005).



Arkansas Governor Bill Clinton.<sup>54</sup> The ads encouraged readers not to cast their vote for Clinton.<sup>55</sup>

Starkly headlined "Christian Beware,"<sup>56</sup> the ads also included text condemning President Clinton's views on a number of positions that were generally considered important to Christian conservatives.<sup>57</sup> These issues included homosexuality, abortion, and condom distribution in schools.<sup>58</sup> The ad claimed that Clinton's views on each of these issues violated Biblical teachings and implied that Christians should not vote for then-Governor Clinton.<sup>59</sup> The bottom of the ad also contained a financial appeal for contributions to benefit the church:

This advertisement was co-sponsored by the Church at Pierce Creek, Daniel J. Little, Senior Pastor, and by churches and concerned Christians nationwide. Tax-deductible donations for this advertisement gladly accepted. Make donations to: The Church at Pierce Creek, [address].<sup>60</sup>

Not only had the church clearly and directly associated itself with the ad, it also presumably hoped to receive an after-the-fact financial benefit from the ad's publication. According to the D.C. Circuit, the ads fulfilled their financial purpose, even if they did not prevent an electoral victory by then-Governor Clinton, by "produc[ing] hundreds of contributions to the Church from across the country."<sup>61</sup>

On November 20, 1992, the IRS initiated a "church tax inquiry" to look into the activities of Branch Ministries, Inc.<sup>62</sup> The investigation was launched after the outcome of the election was known but before President Bush left office.<sup>63</sup> The IRS apparently did not initiate an investigation or sanctions against any of the other "churches . . . nationwide" that cosponsored the advertisement according to the printed tag line.<sup>64</sup>

54 Advertisement, *Christian Beware*, USA TODAY, Oct. 30, 1992, at 4D.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *Branch Ministries v. Rossotti*, 211 F.3d 137, 140 (D.C. Cir. 2000).

62 *Id.*

63 The 1992 presidential election was held on November 4. See [bbc.co.uk](http://news.bbc.co.uk/4/November1992/ClintonBeatsBushtotheWhiteHouse), 4 November 1992: Clinton Beats Bush to the White House, [http://news.bbc.co.uk/onthisday/hi/dates/stories/november/4/newsid\\_3659000/3659498.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/november/4/newsid_3659000/3659498.stm) (last visited Sept. 13, 2005).

64 No other churches were mentioned in the ad. The author arrived at the conclusion that no other churches were investigated since the author could find no reports of any other involved churches being investigated either in case reports, IRS reports, or published media reports.

A church tax inquiry is governed by highly specific rules set forth in the Church Audit Procedures Act (CAPA).<sup>65</sup> The IRS, in the course of a church tax inquiry, investigates whether the church is engaged in any activity that may be subject to federal income taxation.<sup>66</sup> If that investigation is inconclusive, the IRS may then initiate a more extensive “church tax examination”<sup>67</sup> in which the agency may obtain records of the church and examine its activities to establish whether the “organization claiming to be a church is a church.”<sup>68</sup> Following a two-year investigation, the IRS concluded that the Church at Pierce Creek had engaged in activities prohibited for tax-exempt organizations under the tax code and revoked the church’s tax-exempt status.<sup>69</sup>

Stripped of its tax-exempt status,<sup>70</sup> the church challenged the IRS’s ruling in the United States District Court for the District of Columbia.<sup>71</sup> The church disputed the IRS’s authority to carry out the revocation under the First Amendment and the Religious Freedom Restoration Act (RFRA).<sup>72</sup> Through RFRA, Congress intended to require that federal laws that appeared to be religiously neutral on their face, but nevertheless burdened the free exercise of religion, satisfy a compelling government interest.<sup>73</sup> The church also claimed that the IRS violated the Equal Protection Clause of the Fifth Amendment by engaging in selective prosecution under section 501(c)(3).<sup>74</sup>

The church’s challenge was unsuccessful. The district court granted summary judgment in favor of the IRS,<sup>75</sup> and the United States Court of Appeals for the D.C. Circuit affirmed the ruling.<sup>76</sup> Therefore, the current state of the law supports the IRS’s emphasis on a literal reading of the tax code and its related regulations. That is, the commissioner of the IRS has the authority to revoke the tax-exempt status of a church for engaging in

65 *Branch Ministries*, 211 F.3d at 139–40; see also 26 U.S.C. § 7611 (2000) (providing the steps the IRS must follow during a church tax inquiry).

66 See *Branch Ministries*, 211 F.3d at 140 (quoting 26 U.S.C. § 7611(h)(2) (2000)).

67 See *Branch Ministries*, 211 F.3d at 140; see also 26 U.S.C. § 7611(b)(1)(A) (2000).

68 26 U.S.C. § 7611(b)(1)(B) (2000).

69 *Branch Ministries*, 211 F.3d at 140.

70 *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15, 17 (D.D.C. 1999).

71 *Id.* at 18.

72 *Id.* at 19. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, enacted in 1993, is of dubious legality following the Supreme Court’s decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). However, that case was decided after *Branch Ministries* filed its complaint.

73 See 42 U.S.C. § 2000bb(b)(1). RFRA was enacted in direct reaction to the Supreme Court’s decision in *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990), the “Peyote case.” See 42 U.S.C. § 2000bb(a)(4); see also *City of Boerne*, 521 U.S. at 512.

74 See *Branch Ministries*, 211 F.3d at 141.

75 *Branch Ministries, Inc.*, 40 F. Supp. 2d at 17.

76 *Branch Ministries*, 211 F.3d at 145.

prohibited political activity such as the electioneering advertisement engaged in by the Church at Pierce Creek notwithstanding the First Amendment protections that the church and its members may be due.<sup>77</sup>

The D.C. Circuit largely dismissed the church's claim that the IRS's actions had violated the church's First Amendment rights.<sup>78</sup> According to the court, the church could not establish that its free-exercise right had been burdened.<sup>79</sup> Since the privilege of tax exemption is neither conditioned "upon conduct proscribed by religious faith" nor denied on similar grounds, the law does not put "substantial pressure on an adherent to modify his behavior and to violate his beliefs," hence avoiding a First Amendment violation.<sup>80</sup> The court noted that the effects of the revocation were minimal.<sup>81</sup> At worst, donors to the church lost "the advance assurance of deductibility in the event a donor should be audited," and the church could have, in theory, become subject to federal income taxation.<sup>82</sup> However, revocation of the tax-exempt status did not automatically subject the church to income taxation.<sup>83</sup> Bona fide donations, as opposed to funds received in response to the advertisement, did not constitute taxable income to the church.<sup>84</sup> Thus, according to the court's reasoning, the church and its congregants were only minimally burdened.<sup>85</sup> That burden did not arise from the exercise of any specific religious belief or activity but rather from the actions of overt political activity.<sup>86</sup> Of course, the church also had alternative means to communicate its political views without jeopardizing its tax-free status.<sup>87</sup> There

77 *Id.* at 144.

78 *See id.* The court's analysis implied that free speech and free exercise rights extend to the church itself, speaking in terms of whether the church's communication rights were burdened. *See Branch Ministries*, 211 F.3d at 142.

79 *Id.* at 142 (citing *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384-85 (1990) (holding that the free exercise inquiry requires the claimant to prove that the government "has placed a substantial burden on the observation of a central religious belief or practice" and that no "compelling governmental interest justifies the burden")).

80 *Branch Ministries*, 211 F.3d at 142 (quoting *Jimmy Swaggart Ministries*, 493 U.S. at 391-92).

81 *Branch Ministries*, 211 F.3d at 142 (stating "the revocation is likely to be more symbolic than substantial").

82 *Id.* at 142-43. Note that a donor who is subsequently audited will still have the opportunity to establish that the gift to the organization qualifies as a charitable donation, as long as the church has not participated in any prohibited activity during the tax year in question. *Id.* at 143.

83 *Id.* at 143.

84 *Id.*

85 *Id.* at 142.

86 *Id.* at 142-43.

87 *Id.* at 143; *see infra* Part IV.

was no constitutional problem merely because Congress failed to subsidize specific religious activity.<sup>88</sup>

Additionally, the court held that the restrictions under section 501(c)(3) were “viewpoint neutral.”<sup>89</sup> Thus, the restrictions did not violate the First Amendment’s protection of speech, since they did not discriminate based on the point of view expressed but rather the topic discussed. The court also confronted the issue of viewpoint discrimination in evaluating the selection of entities for prosecution by the IRS.<sup>90</sup> In considering this issue, the court drew on the standard announced in *United States v. Washington*,<sup>91</sup> stating that the church must “prove that (1) [it] was singled out for prosecution from among others similarly situated and (2) that [the] prosecution was improperly motivated, i.e., based on race, religion or another arbitrary classification.”<sup>92</sup> The court went on to state that “this burden is a demanding one because ‘in the absence of clear evidence to the contrary, courts presume that government prosecutors have properly discharged their official duties.’”<sup>93</sup>

2. *Lobbying.*—Under section 501(h), lobbying activity by many types of 501(c)(3) nonprofits is treated more moderately than is electioneering by 501(c)(3) organizations.<sup>94</sup> “The Internal Revenue Code restricts lobbying only when it constitutes a ‘substantial’ part of the organization’s activities, while it treats electoral politics as absolutely inconsistent with exemption.”<sup>95</sup> More specifically, “[t]he current law provides that to maintain its 501(c)(3) status, an organization must ensure that ‘no substantial part’ of its activities involves the ‘carrying on [of] propaganda, or otherwise attempting, to influence legislation.’”<sup>96</sup> This moderation is not helpful to churches, however. Although certain charitable organizations may conduct limited lobbying activities under section 501(h)<sup>97</sup> without jeopardizing their sec-

88 *Branch Ministries*, 211 F.3d at 143–44 (quoting *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983)).

89 *Branch Ministries*, 211 F.3d at 144.

90 *Id.*

91 *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) (affirming the conviction of a woman for presenting falsified birth certificates during application for her children’s passports despite the defendant’s assertion of selective prosecution based on her religious beliefs).

92 *Branch Ministries*, 211 F.3d at 144 (quoting *Washington*, 705 F.2d at 494).

93 *Id.* (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).

94 See 26 U.S.C. §§ 501(c)(3), (h)(1) (2000).

95 Allan L. Feld, *Rendering Unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption for Participation in Electoral Politics*, 42 B.C. L. REV. 931, 932 (2001).

96 Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed To Satisfy The Requirements For The Religious Tax Exemption?* 43 CATH. LAW. 29, 74 (2004) (quoting 26 U.S.C. § 501(c)(3) (2000)).

97 Examples include charities, collectively referred to as “public charities,” with educa-

tion 501(c)(3) status,<sup>98</sup> churches are absolutely prohibited from engaging in political activity, including lobbying.<sup>99</sup>

The United States Treasury Regulations have a broad definition of what constitutes "lobbying."<sup>100</sup> Any organization that "[c]ontacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or [a]dvocates the adoption or rejection of legislation" has engaged in lobbying activity.<sup>101</sup> This regulatory framework, coupled with the *Branch Ministries II* decision, has made it more difficult to comply with the law for even well-intentioned nonprofit organizations that take any kind of public position on various issues that may be construed as "political" in nature. Many everyday utterances from the church pulpit or in a typical Bible study meeting could very well be construed to fall into the category of lobbying as defined by the treasury regulations.

The Supreme Court has twice rejected claims challenging such statutory restrictions on lobbying,<sup>102</sup> ruling that the Constitution does not compel Congress to subsidize activities which it does not want to subsidize merely because the actor is a religious organization.<sup>103</sup> However, the Court has not yet considered the validity of such restrictions in the context of the free exercise clause of the First Amendment.<sup>104</sup> Lower courts, though, have addressed the question and have held that Congress is not constitutionally required to permit lobbying by groups that claim a section 501(c)(3) exemption.<sup>105</sup> When lobbying is a substantial part of the organization's activities, the organization must be treated under section 501(c)(4) of the tax code.<sup>106</sup>

At the same time, Congress has rejected attempts to soften or clarify the restrictions on lobbying. Two attempts to make such changes failed in 2001. One was legislation "to amend the [tax code] to permit churches

---

tional, medical, and government-related purposes. See 26 U.S.C. § 501(h)(4)(A)-(D) (2000).

<sup>98</sup> See 26 U.S.C. § 501(h) (2000).

<sup>99</sup> See 26 U.S.C. § 501(h)(5)(A) (2000); see also James, *supra* note 96, at 30, 74.

<sup>100</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (as amended in 1990).

<sup>101</sup> *Id.*

<sup>102</sup> See *Regan v. Taxation with Representation*, 461 U.S. 540, 545-46 (1983) (rejecting the argument "that First Amendment rights are somehow not fully realized unless they are subsidized by the State"); *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (discussing deductibility of lobbying expenditures in general).

<sup>103</sup> See *Regan*, 461 U.S. at 545-46.

<sup>104</sup> See *Feld*, *supra* note 95, at 932.

<sup>105</sup> See, e.g., *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 854-55 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973); *Slee v. Comm'r*, 42 F.2d 184, 185 (2d Cir. 1930); *Haswell v. United States*, 500 F.2d 1133, 1142 (Ct. Cl. 1974).

<sup>106</sup> See *infra* notes 162-64 and accompanying text.

and other houses of worship to engage in political campaigns.”<sup>107</sup> The other attempt, called the Bright-Line Act of 2001, would have amended the tax code “to clarify the restrictions on the lobbying and campaign activities of churches.”<sup>108</sup>

Certainly, the presence of these limitations in the tax code has not prevented churches from becoming overtly involved in the political process through lobbying any more than it has prevented churches from engaging in electioneering activities. The Roman Catholic Church was particularly energized following the *Roe v. Wade*<sup>109</sup> decision in 1973.<sup>110</sup> During the 1980s, the Catholic Church faced a series of lawsuits alleging that the church was illegally engaging in various forms of political activity and lobbying.<sup>111</sup> The cases were ultimately dismissed for lack of standing by the plaintiffs and the church was never forced to answer the substantive charges.<sup>112</sup>

Religiously affiliated groups have still found ways to lobby, despite the outright ban on lobbying by churches, at least in part through “outside” groups such as the Christian Coalition of America. The Christian Coalition, a politically active conglomeration of evangelical Christians,<sup>113</sup> lists a number of lobbying goals on its web site.<sup>114</sup> While not a church itself, the Christian Coalition works extensively with local congregations.<sup>115</sup> The coalition, as one of its primary organizational tools, works in concert with churches to achieve its goals.<sup>116</sup> For example, the coalition uses local congregations as the primary means of distribution for the millions of voter guides it produces for local elections.<sup>117</sup> Americans United for Separation of Church and

107 James, *supra* note 96, at 79 n.273 (quoting Houses of Worship Political Speech Protection Act, H.R. 2357, 107th Cong. (2001)).

108 James, *supra* note 96 at 79, n.273 (quoting Bright-Line Act of 2001, H.R. 2931, 107th Cong. (2001)).

109 *Roe v. Wade*, 410 U.S. 113 (1973).

110 See James, *supra* note 96, at 49.

111 *Id.* at 50–51. These cases are collectively known as the Abortion Rights Mobilization cases, a series of cases initiated in New York. The plaintiffs, in defending the right to a legal abortion, filed suits against the commissioner of the IRS, the secretary of the Treasury, and the National Conference of Catholic Bishops, among others. *Id.* at 79 n.131.

112 *Id.* at 51.

113 See Christian Coalition of America, About Us, <http://www.cc.org/about.cfm> (last visited Sep. 7, 2005).

114 See Christian Coalition of America, Legislative Agenda for the 109th Congress (2005), <http://www.cc.org/issues.cfm> (last visited Sep. 7, 2005); see also James, *supra* note 96, at 59 (noting the Christian Coalition’s lobbying agenda for 2003).

115 See James, *supra* note 96, at 60.

116 *Id.*

117 Erik J. Ablin, Note, *The Price Of Not Rendering To Caesar: Restrictions On Church Participation In Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541, 542, 554–55 (1999).

State, a major opponent of the Christian Coalition, has characterized these voter guides as "partisan political propaganda."<sup>118</sup>

While electioneering is prohibited to all nonprofits,<sup>119</sup> and both lobbying and electioneering are prohibited to churches and affiliated organizations,<sup>120</sup> such organizations continue to undertake both types of activities rather widely. The ability of churches and other nonprofit organizations to continue these activities under the current law will ultimately depend on the level of enforcement by the IRS.

### *C. Effect of IRS Rulings*

Several important IRS rulings have contributed to, or are indicative of, the current state of the law. In 1989, the Christian Coalition requested status as a section 501(c)(4) organization<sup>121</sup> which would have allowed the organization to operate free of federal income taxation while participating in issue advocacy but would not have permitted donors to deduct donations to the organization from their adjusted gross income.<sup>122</sup> The IRS delayed handing down its decision for years.<sup>123</sup> During that period, the coalition operated under provisional tax-exempt status, thus it paid no federal tax on its income.<sup>124</sup> In 1999, the IRS issued a ruling that denied tax-exempt status to the coalition.<sup>125</sup> According to the IRS, the content of the voter guides distributed by the coalition was a major factor in the denial.<sup>126</sup>

The coalition had asserted that it was a nonpartisan, voter-education group.<sup>127</sup> Unlike the voter guides distributed by most such groups, however, the coalition's guides focused on a narrow group of issues generally considered to be highly partisan and explained candidates' positions in relatively "simplistic terms."<sup>128</sup> The adverse ruling did not deter the coalition which immediately announced that it would restructure its organization and con-

118 Pat Gilliland & Susan Parrott, *MetroChurch's Role in Election Questioned*, DAILY OKLAHOMAN, July 4, 1997, at 1. Prior to the November elections in 1996 and 1998, Americans United for Separation of Church and State sent letters and emails to churches warning them that distribution of voter guides produced by the Christian Coalition could jeopardize their tax-exempt status. See Ablin, *supra* note 117, at 542.

119 26 U.S.C. § 501(c)(3) (2000).

120 26 U.S.C. §§ 501(c)(3), 501(h) (2000).

121 See Mary Jacoby, *Christian Coalition is Denied Tax-Exempt Status*, ST. PETERSBURG TIMES, June 10, 1999, at 1A.

122 See 26 U.S.C. § 501(c)(4) (2000).

123 See Jacoby, *supra* note 121, at 1A.

124 *Id.*

125 See Lee, *supra* note 13, at 398.

126 See Jacoby, *supra* note 121, at 1A.

127 See *id.*

128 *Id.*

tinue its public work.<sup>129</sup> The group was to split into two distinct organizations: a for-profit corporation to conduct political activity and a nonprofit that would continue “voter education” programs.<sup>130</sup>

Treasury regulations help provide the framework for substantive analysis of political statements. Based on the regulations, the Treasury Department has issued a memorandum that provides a structure for analyzing the activities of tax-exempt organizations under investigation and also provides some insight into how the IRS is likely to resolve future cases.<sup>131</sup> Under the standard promulgated in the memorandum, “partisan political activity” includes “the publication or distribution of written statements or the making of oral statements on behalf of or in opposition to” a candidate for public office.<sup>132</sup> “To determine whether such a statement has been made, the IRS considers a number of factors, including the size of the targeted audience and whether there was intent to target the statement to a particular area in which an election will take place or to time the statement to coincide with an election.”<sup>133</sup> In addition, the IRS has issued a memo establishing particular criteria for determining when partisan activity crosses the line.<sup>134</sup>

In response to the D.C. Circuit’s decision in *Big Mama Rag, Inc. v. United States* in 1980,<sup>135</sup> the IRS promulgated a new procedure document.<sup>136</sup> The document was designed to “publish the criteria used by the Internal Revenue Service to determine the circumstances under which advocacy of a particular viewpoint or position by an organization is considered educational within the meaning of section 501(c)(3).”<sup>137</sup> The criteria listed were: (1) whether “[t]he presentation of viewpoints or positions unsupported by facts is a significant portion of the organization’s communications”<sup>138</sup>; (2) the degree to which the “facts that purport to support the viewpoints or positions are distorted”<sup>139</sup>; (3) the degree to which the statement makes “substantial use of inflammatory and disparaging terms and express[es] conclusions more on the basis of strong emotional feelings than of objec-

129 See Lee, *supra* note 13, at 398–99.

130 See James, *supra* note 96, at 61.

131 Lee, *supra* note 13, at 398–99. Professor Lee points out that memoranda of this nature are “for the benefit of the field agents but are not considered binding authority.” *Id.* at 402 n.82.

132 *Id.* at 402 (quoting Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1990)).

133 *Id.*

134 *Id.* (quoting Rev. Proc. 86-43, 1986-2 C.B. 729).

135 *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1039–40 (D.C. Cir. 1980) (holding that an earlier IRS regulation was unconstitutionally vague).

136 See Rev. Proc. 86-43, 1986-2 C.B. 729

137 *Id.*

138 *Id.*

139 *Id.*



tive evaluations"<sup>140</sup>; and (4) the degree to which the approach used in the statement "is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter."<sup>141</sup>

The policy behind the criteria was that speech would be considered educational only if it "presents a sufficiently full and fair exposition of the pertinent facts as to permit [formation of] an independent opinion or conclusion," but not the "mere presentation of unsupported opinion."<sup>142</sup> The procedure also noted that any determination of whether an organization has an educational purpose would be made based upon "the method used by the organization to communicate its viewpoint or positions to others."<sup>143</sup> Additionally, the IRS recognized that there may be "exceptional circumstances" in which an organization's advocacy activities may qualify as educational even when it does not strictly comply with the criteria set out above.<sup>144</sup>

While noble in aspiration, the structure of the current law is not fully workable and does not realistically reflect modern American political-religious life. The next section will examine some of the problems under the existing legal scheme and will suggest some of the traps that churches may fall into while engaging in ordinary theological activities.

### III. INHERENT PROBLEMS

It is well settled that Congress has the right to promulgate policy through manipulation of the tax code.<sup>145</sup> For instance, Congress has long denied tax exemption to racially discriminatory organizations such as nonreligious private schools and colleges that would otherwise qualify for a tax exemption.<sup>146</sup> Through this carrot-and-stick approach, Congress can encourage organizations not to enact certain policies or engage in certain activities, even when the private conduct is beyond the prohibitory ability of Congress.

However, it is in the nuances of the law that trouble arises. Congress has chosen to grant a tax exemption to religious organizations in general while subsequently denying that same exemption to those among them that are politically active in a manner specifically defined by statute.<sup>147</sup> Congress

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See U.S. CONST. art. I, § 8, cl. 1.

<sup>146</sup> See generally Karla W. Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477 (1981).

<sup>147</sup> See *supra* notes 121-44 and accompanying text.

and the executive agencies that carry out congressionally mandated policy are thus put in the undesirable position of examining religious speech or activity to determine whether the expression is primarily political in nature. It is inherently difficult to draw a bright line between religious and political speech. Many of the most divisive and widely debated political issues of our day, such as abortion and homosexual rights, among others, have deep religious undertones. Of course, churches and various faith groups come down on both sides of many of these issues.<sup>148</sup>

On the other hand, many topics of faith that would regularly be spoken of from the pulpit regardless of political relevancy are indeed relevant to ever-changing local and national political controversies. Abortion is an important issue to many people and has serious ethical implications, regardless of legality. Homosexuality would likely remain an issue in the churches even if there was no political controversy surrounding gay rights since the specific references to homosexuality in the Bible<sup>149</sup> are subject to varying interpretations.<sup>150</sup> Certainly Muslims and Jews, and to a lesser extent Christians, have a stake in the geopolitical happenings of the Middle East, especially the Israeli-Palestinian conflict. Congregants in each of those faith traditions would have an active interest, expressed through religious teachings, even if events in that portion of the world were not a primary focus of modern American foreign policy. There is no easy way to divide religious and political activity cleanly into entirely separate compartments.

Admittedly, overtly partisan political activity is somewhat easier to identify and categorize than is issue-related activity. But, recall the highly controversial voter guides that led to the denial of tax-exempt status to the Christian Coalition.<sup>151</sup> The voter guides in question were ostensibly non-partisan; indeed, they devoted equal space to listing information regarding the candidates of each party.<sup>152</sup> Nevertheless, no serious observer would

148 For example, while Focus on the Family, a conservative, evangelical movement, supports prayer in school, see Cheri Fuller, *Rebuilding Hope for Public Schools*, FOCUS ON THE FAMILY MAGAZINE (1999), available at <http://www.family.org/fofmag/pp/a0024028.cfm>, and actively supports president Bush's judicial nominations, see Pete Winn, *Bush Renominates 20 to Bench*, CITIZEN LINK, Feb. 16, 2005, available at <http://www.family.org/cforum/feature/a0035554.cfm>, the more liberal Interfaith Alliance, composed primarily of mainline Protestants, opposes officially sanctioned school prayer, see The Interfaith Alliance, *School-Sponsored School Prayer*, <http://www.interfaithalliance.org/site/pp.asp?c=8dJIIWMCE&b=121149> (last visited Sept. 3, 2005), and fights government attempts to promote specific religions through displays on public property, see The Interfaith Alliance, *Government Display of Religious Doctrine*, <http://www.interfaithalliance.org/site/pp.asp?c=8dJIIWMCE&b=358795> (last visited Sept. 3, 2005).

149 See, e.g., *Genesis* 19; *Leviticus* 18:22; *Leviticus* 20:13; *1 Corinthians* 6:9.

150 See Robert Nugent & Jeannine Gramick, *Homosexuality: Protestant, Catholic, and Jewish Issues: A Fishbone Tale*, in *HOMOSEXUALITY AND RELIGION* 7, 10 (Richard Hasbany ed., 1989).

151 See *supra* notes 121, 128–29 and accompanying text.

152 See Ablin, *supra* note 117, at 542.

have argued that the voter guides did not dramatically favor the Republican Party.

For the IRS to make such a determination, however, involves government inquiry into the content of speech. When the subject of the inquiry is a church, rather than a religious advocacy group, and when the speech in question more nearly approaches a traditional religious exercise—a sermon during a Sunday service, for instance—the inquiry delves into the realm of free exercise of religion as well. Such an inquiry places the government in a difficult position, as it involves investigation into private religious conduct, and the examination is likely to leave its targets unhappy or even feeling that their rights have been violated regardless of the eventual outcome of that investigation. Of course, such a probe also comes perilously close to traditionally protected areas under the First Amendment.<sup>153</sup>

In addition, there has been a clear history of selective enforcement of the tax-code limitations on 501(c)(3) organizations.<sup>154</sup> In particular, in *Branch Ministries*, a church was stripped of its tax exemption for engaging in political activity at the very time many other churches, both conservative and liberal, were also actively pursuing electoral politics.<sup>155</sup> There is no indication that this new pattern of selective enforcement will change in the foreseeable future. The current Bush administration has clearly shown its willingness to use the tax code against the NAACP<sup>156</sup> which is generally considered to be a political adversary of the administration.

However, the only publicized instance of tax-code enforcement directed toward a church was directed toward one associated with the Religious Right.<sup>157</sup> For many years, the Catholic Church and many black churches have been politically active.<sup>158</sup> The Catholic hierarchy, if not rank-and-file Catholics, has been unwavering in its support of the Republican Party at least since the decision in *Roe v. Wade*.<sup>159</sup> Black churches have almost unanimously supported candidates in the Democratic Party and have often featured candidates campaigning and sometimes preaching from the churches'

153 See *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000).

154 See *supra* notes 18–34 and accompanying text.

155 See *Branch Ministries*, 211 F.3d at 144–46.

156 See *supra* notes 25–34 and accompanying text.

157 See *supra* note 64 and accompanying text.

158 Throughout the 1990s, black Protestants were more likely than adherents to any other Christian tradition to receive political information in church. White Catholics, while less likely than evangelicals to be exposed to political information at church, were more likely to receive the same than were white mainline Protestants. Clyde Wilcox & Lee Sigelman, *Political Mobilization in the Pews: Religious Contacting and Electoral Turnout*, 82 SOCIAL SCIENCE QUARTERLY 524, 529.

159 See *supra* notes 109–12 and accompanying text.

pulpits.<sup>160</sup> Yet there has been no reported IRS action against either of these large, visible, and highly active religious groups.

Perhaps the clearest difficulty in enforcing these restrictions is the scope of the problem. Even if the IRS did intend to step up enforcement of the limitations on political activity, to do so would seem to be almost impossible. In the year 2000, there were more than 250,000 active churches, synagogues, mosques, and other houses of worship in the United States.<sup>161</sup> The IRS, or any other government agency, could not possibly monitor the sermons, liturgies, newsletters, literature distributions, and other communications of those 250,000 churches to constantly determine whether any prohibited political activity was being carried on within (or outside) the church walls. Even if the government had the desire and the resources to attempt such a monitoring program, it seems highly unlikely that the American people would condone such an invasion of religious liberty and personal privacy in religious establishments across the country. It is against the American tradition to accept such invasive actions by the government. The reality remains that without careful and close monitoring, it will be nearly impossible to enforce an all-out ban on electioneering and lobbying by religious organizations.

#### IV. ALTERNATIVES

The simplest alternative for section 501(c)(3) organizations that fear reprisal for their electoral involvement would be to withdraw from the political process. This alternative is hardly a realistic suggestion though. In the pluralistic democracy of the United States, Americans are taught from an early age about the importance of participation in electoral politics. Additionally, as discussed above, people of faith and the institutions that cater to them have an inherent interest in many divisive political issues that are fully independent of the existence of an ongoing public debate. Thus, churches and churchgoers are unlikely to separate themselves from discourse on political issues.

Religious organizations and other nonprofits that are going to engage in political activity must take pains to do so within the bounds of the law. The primary alternative available today to a church that wants to become more involved in the political process, while preserving its tax-exempt status, is to incorporate a related section 501(c)(4) entity to be the church's "politi-

160 See Eric McDaniel, *Black Clergy in the 2000 Election*, 42 J. FOR THE SCI. STUDY OF RELIGION 533–34, 546 n. 1 (discussing the close ties to the Democratic Party of two of the largest African-American congregations).

161 American Religion Data Archive, Religious Groupings, [http://www.thearda.com/test\\_main.asp?Show=RCMS2000](http://www.thearda.com/test_main.asp?Show=RCMS2000) (last visited Jan. 9, 2005).

cal wing.”<sup>162</sup> A section 501(c)(4) organization will still be tax exempt, but contributions to it will not be tax-deductible to the donor.<sup>163</sup> The section 501(c)(4) entity will be able to participate in issue advocacy but will not be able to give money directly to or directly support individual candidates.<sup>164</sup> For a church to be able to support specific candidates, it will require an additional layer to its organization. To make direct contributions to candidates, those contributions must go through a political action committee (PAC). A church cannot create a PAC directly.<sup>165</sup> Instead, the church’s section 501(c)(4) entity must form the PAC. The creation of such a hierarchy can result in additional formation costs, as well as a perceived disconnect between the parent organization, the related section 501(c)(4), and the PAC.

All of this is obviously cumbersome, and it creates significant transaction costs both to establish the proper entities and to maintain separate identities once the system is created.<sup>166</sup> Therefore, it is an imperfect solution to the problems churches face in the political arena. For many smaller congregations, the costs or organizational requirements may make the establishment of such a multitiered system impossible. The result is either that churches are forced to operate illegally, or religious expression and political speech are chilled within the significant sphere in which the two areas overlap. For many people of faith from all traditions, and especially for members of the religious right which as a whole has become very overtly politically active during the last two decades,<sup>167</sup> this is really no choice at all.

## V. CONCLUSION

A significant number of churches remain politically active.<sup>168</sup> One commentator has even posited that “[w]hile the [Internal Revenue] Service remains silent, the churches of the Religious Right continue to benefit from their

162 See *supra* notes 131–32 and accompanying text.

163 26 U.S.C. § 501(c)(4) (2000).

164 See Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii); see also *Regan v. Taxation With Representation*, 461 U.S. 540, 552 (1983).

165 See *Branch Ministries v. Rosotti*, 211 F.3d 137, 143 (D.C. Cir. 2000).

166 These can include filing fees, transaction costs (such as the employment of an attorney) to create the organization, extra costs from more complex bookkeeping requirements, etc.

167 GEOFFREY LAYMAN, *THE GREAT DIVIDE: RELIGIOUS AND CULTURAL CONFLICT IN AMERICAN PARTY POLITICS* ix–xiii (2001).

168 See generally David Masci, *Religion and Politics*, 14 CQ RESEARCHER 639 (2004) (discussing political activity by religious groups during the 2004 presidential election).

tax-exempt status while not living up to the responsibilities thereof.”<sup>169</sup> But the current runs both ways, and a number of § 501(c)(3) organizations throw their energies behind candidates on the Left as well.<sup>170</sup>

It is apparent that while the current system may be dedicated to an ideological aspiration of separation of church and state, it has failed as a practical means of keeping churches out of politics. Furthermore, and most problematically, the letter of the law does not reflect the current state of political-religious entanglement within the American electoral system.

There are several alternatives that would bring law and common practice into sync with one another. Stricter enforcement would put the current law truly into effect. This, of course, would require implementation of widespread systems to monitor political activity by churches and other section 501(c)(3) organizations. Such a system would be costly at best and impossible to create and administer at worst. In any event, such a system would be highly undesirable to those who think government should not be interfering in the internal activities of churches and monitoring the speech of groups such as the NAACP.

The current system of “looking the other way,” except for a few instances of selective enforcement, could continue, though this system has allowed religious influence in politics to prosper while upsetting supporters nationwide of those few organizations that are targeted for enforcement. Congress’ intent in establishing the tax code in its current incarnation was to keep churches and other groups that the government subsidizes through tax exemption from becoming entangled in the political system. That is the policy our nation has established in theory but has not put into effect.

Finally, the laws could be rewritten to better reflect the current state of political involvement by section 501(c)(3) organizations in such a way that allows continued political involvement. There is certainly a demand among Americans for such political-religious activities as evidenced by the current and sustained high levels of religious and nonprofit involvement in political issues. This may be the best and most workable solution in the long term but only if it can be done without fostering excessive entanglement between church and state.<sup>171</sup> Such an extensive reform will entail a new conversation between lawmakers, religious and charitable leaders, and people of faith to reshape the foundation of American policy dealing with the interaction between tax exemption and politics. That conversa-

169 James, *supra* note 96, at 63.

170 See *supra* notes 27 and 160 and accompanying text.

171 The “excessive entanglement” provision is one of the three prongs of the *Lemon* test for determining whether a statute violates the Establishment Clause. The complete test, announced in *Lemon v. Kurtzman*, states: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.” *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (citations omitted).

tion would first need to determine what the new relationship should be and then decide how to codify that relationship effectively. Such a conversation would not be a short or easy one, but it could be an important one for American public policy.